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No. 05-11304

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

VIRGINIA E. SLOAN
PRESIDENT
THE CONSTITUTION PROJECT
1025 Vermont Ave., N.W.
Third Floor
Washington, D.C. 20005
(202) 580-6923

SETH P. WAXMAN
Counsel of Record
DANIELLE SPINELLI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W
Washington, D.C. 20006
(202) 663-6000

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Amicus curiae The Constitution Project respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICUS CURIAE

The Constitution Project is a bipartisan non-profit organization that seeks solutions to contemporary constitutional issues through a combination of scholarship and public education. The Project's essential mission is to promote constitutional dialogue. To that end, it creates bipartisan blue-ribbon committees comprised of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and with ensuring that those guarantees are respected and enforced by all three branches of govern-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this amicus brief have been submitted to the Clerk.

ment. More specifically, the Project recognizes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In May 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others. Although the Initiative does not take a position on the death penalty, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. In 2006, the Initiative released an updated version of its 2001 report and consensus recommendations. *Mandatory Justice The Death Penalty Revisited* describes 32 reforms that the committee believes are essential to reduce the risk of wrongful capital convictions and executions.

This Court's decision in *Smith* v. *Texas*, 543 U.S. 37 (2004), addressed and reinforced one of the most important procedural protections for capital defendants: the ability to present all relevant mitigating evidence to the jury and have the jury consider that evidence. Recommendations 26 and 27 in *Mandatory Justice* describe the Death Penalty Initiative committee's belief in the importance of mitigating factors in the jury's decision-making process. By disregarding the plain import of this Court's decision in *Smith*, the decision of the Texas Court of Criminal Appeals on remand threatens to eviscerate that essential protection. More broadly, it threatens this Court's authority as the final judicial arbiter of federal constitutional law. The Constitution Project therefore urges that the petition for certiorari be granted.

INTRODUCTION

In 1869, this Court reversed the Supreme Court of Missouri in a case involving a dispute over a parcel of land from the Louisiana Purchase. *Maguire* v. *Tyler*, 75 U.S. (8 Wall.) 650, 668 (1869). The Court found that the land in question had been granted by the Spanish governor to plaintiff John

Magwire's assignor, and had been properly confirmed by federal commissioners. *Id.* at 653-654, 660. On remand, the Missouri court conceded that this Court had decided the question of title in favor of Magwire, but refused to give effect to the judgment. *Magwire* v. *Tyler*, 47 Mo. 115, 125-126, 129 (1870). Instead, the court dismissed Magwire's action on a state-law ground that had not previously been raised. *Id.* at 126-128. On a second writ of error, this Court affirmed its jurisdiction and again reversed the Missouri court, explaining:

> State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. . . . [I]t is clear that it was too late to raise any [additional] question after the whole case had been decided and the cause remanded for final judgment.

Tyler v. *Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872).

As *Magwire* illustrates, throughout this nation's history, this Court has confronted cases in which a state or lower federal court has contravened this Court's direction—either openly or through evasive maneuvers such as those employed in *Magwire*. In such cases, this Court has repeatedly asserted its authority to protect the integrity of its mandate and, ultimately, the supremacy of federal law.

Here, once again, a state court has failed to heed this Court's dictates, and this Court should grant review to reaffirm that its decisions must be followed.

Petitioner LaRoyce Lathair Smith was convicted of capital murder in Dallas County, Texas. At sentencing, he presented evidence that he had learning disabilities and a low IQ; that his father was a violent drug addict; and that he was only nineteen when he committed the crime. The jury was instructed to answer two "special issues": whether the murder was deliberate, and whether the defendant was likely to be dangerous in the future. Under Texas law, affirmative answers to those two questions mandated the

death penalty. In an effort to comply with this Court's decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the judge gave a supplemental "nullification" instruction directing the jury that it could respond to petitioner's mitigating evidence by answering "No" to one of the two special issues, even if the evidence otherwise required an affirmative answer. The jury answered "Yes" to both special issues and sentenced petitioner to death. The Texas Court of Criminal Appeals rejected petitioner's request for postconviction relief, reasoning that his mitigating evidence was not constitutionally significant and that the nullification instruction provided a sufficient vehicle for the jury to consider the evidence. *Ex parte Smith*, 132 S.W.3d 407, 413-417 (Tex. Crim. App. 2004); *see Smith* v. *Texas*, 543 U.S. 37, 37-38 (2004) (per curiam) (describing proceedings below).

This Court reversed the Texas Court of Criminal Appeals. *Smith* v. *Texas*, 543 U.S. 37. Finding that petitioner's evidence was relevant for mitigation purposes, it criticized the Texas court for failing to follow the "plain" meaning of the Court's precedent and for relying "on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (citing *Tennard* v. *Dretke*, 542 U.S. 274 (2004)). It held that the jury instructions at petitioner's trial were "constitutionally inadequate" because they did not allow jurors to give appropriate consideration to that mitigating evidence. *Id* at 48. The Court explained that "petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And . . . the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* It therefore reversed and remanded for further proceedings not inconsistent with its opinion. *Id* at 48-49.

Yet, on remand, the Texas Court of Criminal Appeals disregarded this Court's analysis. It interjected a new procedural obstacle to Smith's federal claim—one that it had previously declined to impose—and it justified the applica-

tion of that obstacle by reverting to a line of reasoning that this Court had specifically rejected *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). It once again questioned the relevance of petitioner's mitigation evidence, *id.* at 464-466, and, applying the state's harmless error standard, concluded that the nullification instruction provided an adequate vehicle through which the jury could consider that evidence, *id.* at 468-472. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue: even more seriously, it undermines the constitutional authority of the Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Texas Court of Criminal Appeals, pursuant to Supreme Court Rule 16. In the alternative, the Court should grant plenary review and set the case for briefing and argument. It is critically important that this Court review the Texas court's decision, for two related reasons.

First, the decision of the Texas Court of Criminal Appeals contravenes this Court's opinion and mandate, disregarding the Court's carefully reasoned conclusions regarding the constitutional inadequacy of the jury nullification instruction. Summary reversal is appropriate to vindicate the concerns that warranted the Court's original grant of certiorari and to correct the Texas court's failure to heed this Court's clear direction. *See, e g , Sumner* v. *Mata*, 455 U.S. 591, 596-597 (1982) (granting certiorari and summarily vacating and remanding where the lower court "apparently misunderstood the terms of our remand" and reached a result inconsistent with the Court's prior opinion); Robert L. Stern et al., *Supreme Court Practice* 322 n.101 (8th ed. 2002) ("Summary reversal may . . . be grounded on the inherent power of the Court . . . to insure compliance with its own remand orders.").

Second, this Court should grant review, as it has done repeatedly throughout its history, to affirm its authority un-

der the Supremacy Clause to prevent state and lower federal courts from evading or frustrating its plain direction. Since the early days of the Republic, the Court's resolve when faced with state and lower court resistance to compliance with its mandates has been essential to maintaining its authority. Firmness is no less important in this instance.

I. THE TEXAS COURT OF CRIMINAL APPEALS' DECISION CONTRAVENES THIS COURT'S REASONED ANALYSIS IN *SMITH*

1. When this case was last here, the Court held unambiguously that the jury instructions at the penalty phase of petitioner Smith's trial were "constitutionally inadequate" because they disabled the jury from considering his extensive mitigating evidence. *Smith* v. *Texas*, 543 U.S. 37, 48 (2004) (per curiam). Nevertheless, the Texas Court of Criminal Appeals on remand applied its state harmless-error standard to reject petitioner's federal constitutional claim, on the theory that the jury instructions did in fact provide an adequate vehicle through which the jurors could consider petitioner's evidence. According to the court, the petitioner failed to show "egregious harm" because he failed "to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence." *Ex parte Smith*, 185 S.W.3d 455, 471 (Tex. Crim. App. 2006). In so holding, the court on remand disregarded this Court's specific findings and contravened the clear import of its decision in two critical ways.

First, the Texas court ignored this Court's finding that petitioner's mitigation evidence did not fit "within the scope of the special issues" in such a way that the jurors could properly consider and give effect to that evidence. *Smith*, 543 U.S. at 46 (quoting *Penry* v. *Johnson*, 532 U.S. 782, 799-800 (2001) (*Penry II*)); *see id* at 47-48. Although the Texas court acknowledged that the "analytical framework" it had used in concluding that "the jury could fully address this evidence within the confines of the two special issues" had been repudiated by this Court in *Tennard* v. *Dretke*, 542

U.S. 274 (2004), it professed to be "uncertain whether the Supreme Court also concluded that some of the applicant's mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues." *Ex parte Smith*, 185 S.W.3d at 464; *see also id.* at 466.[2] Accordingly, it proceeded to "reexamine" petitioner's mitigation evidence and concluded that almost all such evidence was, in fact, "encompassed under the 'future dangerousness' special issue," with the remainder likely covered by deliberateness. *Id.* at 465-466; *see also id.* at 472.[3]

That reasoning flatly contradicts this Court's analysis. In *Smith*, this Court did *not* leave open the question whether the special issues fully encompassed petitioner's mitigation evidence. Rather, it made perfectly clear that the special issues were inadequate. After carefully reviewing the particular mitigation evidence in question, 543 U.S. at 41, 44-45, it concluded that, "[j]ust as in *Penry II*," the questions regarding "deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence petitioner presented," *id.* at 48. The jury instruction, including the special questions, was "constitutionally inadequate," *id*, because it did not "empower the jury with a ve-

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[2] While repeatedly professing its uncertainty about this Court's holding regarding the special issues, *Ex parte Smith*, 185 S W 3d at 464, 466-467, the Texas court elsewhere declared that "the Supreme Court did *not* address our conclusion that the two special issues provided applicant's jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence," *id* at 463 (emphasis added) (internal quotations omitted) As discussed in text, this statement disregards this Court's plain holding that the special issues were inadequate to permit the jury to give effect to petitioner's evidence *See Smith*, 543 U S at 47-48

[3] The Texas court then purported to assume "for the sake of argument, that at least some of the applicant's evidence was not fully encompassed by the two special issues" *Ex parte Smith*, 185 S W 3d at 466-467 Yet, even after this ostensible concession, the court insisted, at the close of its opinion, that it was merely "possible" that "the two special issues may not have fully and completely encompassed every single bit" of the evidence *Id* at 472.

hicle capable of giving effect to that evidence," *id.* at 45. In concluding otherwise, the Texas court ignored this Court's specific finding.

Second, the Texas Court of Criminal Appeals disregarded this Court's holding that the nullification instruction given to the jurors left them in an impermissible ethical dilemma. As this Court explained in *Smith*, it would have been "both logically and ethically impossible for a juror to follow both" the instructions relating to the special issues and the instructions relating to mitigating evidence. 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict.'" *Id.* (quoting *Penry II*, 532 U.S. at 800). Furthermore, for Eighth Amendment purposes, the jury instruction in *Smith* was indistinguishable from the one the Court had previously ruled unconstitutional in *Penry II*: "[T]he clearer instruction given to petitioner's jury did not resolve the ethical problem .... To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors.... [T]he 'jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Id* at 47-48 (quoting *Penry II*, 532 U.S. at 801).

This Court thus held that, on these facts, the nullification instruction did not allow the jurors to give consideration and effect to the mitigating evidence. But, on remand, the Texas Court of Criminal Appeals did not heed that conclusion. Although it paid lip-service to the Court's conclusion that "the nullification instruction intensified the dilemma faced by ethical jurors in this case," it went on to dismiss the ethical dilemma as a mere "possibility," insufficiently real to warrant granting petitioner a new penalty trial. *Ex parte Smith*, 185 S.W.3d at 468 (internal quotations omitted). According to the Texas Court, there was no "actual" ethical dilemma because neither the jurors, the parties, nor the trial judge noted one, and during voir dire the jurors "[o]verwhelmingly . . . agreed" that they understood and

could follow the nullification procedure. *Id.* Moreover, "the prosecutor never suggested that the jury should ignore or fail to consider any of [petitioner's] mitigation evidence," *id.* at 471, and "[a]ll of [petitioner's] mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment," *id.* at 472.

None of the factors on which the Texas court relied can justify its disregard of this Court's express holding that, on these facts, the nullification instruction was constitutionally inadequate. The Texas court's reliance on jurors' statements during voir dire ignores this Court's holding that, by its very nature—even if jurors clearly understood it—the nullification instruction placed jurors in an intractable bind: it would have been "logically and ethically impossible" to comply both with the nullification instruction and their oath to render a true verdict on the special issues. *Smith*, 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). The notion that the prosecutor's closing mitigated this dilemma contradicts this Court's finding that the prosecutor heightened the jurors' ethical dilemma when he "reminded the jury that each and every one of them had promised to 'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." *Id* at 48 n.5. And the Texas court's assertion that petitioner suffered no egregious harm from the deficient instructions because he presented a "compelling" and "persuasive" case on mitigation gets it precisely backwards: as this Court recognized, petitioner was harmed *because* he presented powerful mitigating evidence and the jury had no adequate vehicle to give effect to that evidence.

As this Court explained in *Tennard*, "the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." 542 U.S. at 285 (internal quotations omitted); *see also Penry II*, 532 U.S. at 797. State and lower courts may not evade this principle by imposing a "restrictive gloss" on the Court's precedent. *See Tennard*, 542 U.S. at 283. But that is exactly

what the Texas court did here, undermining this Court's repeated holdings regarding the relevance of mitigation evidence and the inadequacy of the nullification instruction.

2. The Texas Court of Criminal Appeals' invocation of state harmless-error law does not authorize or excuse its failure to abide by this Court's decision. According to the Texas court, application of the "egregious harm," rather than "some harm," standard was appropriate because petitioner failed to raise his claim of jury-charge error at the trial level. *See Ex parte Smith*, 185 S.W.3d at 463-464, 468 (citing *Almanza* v. *State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)). Yet, the Texas Court of Criminal Appeals had twice before rejected the argument that petitioner failed to preserve his jury charge claim, and had previously addressed the merits of the claim without imposing any procedural barriers. *See Smith* v. *State*, No. 71,333 (Tex. Crim. App. June 22, 1994); *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004).[4] Indeed, this Court, when first reversing the Texas court, expressly noted that the majority had declined to find petitioner's claim procedurally defaulted and had instead decided it on the merits. *Smith*, 543 U.S. at 43 n.3. Only after the Texas Court of Criminal Appeals received an unfavorable ruling on the merits from this Court did it devise a theory of unpreserved error.

This Court has repeatedly refused to permit state courts to apply a state-law procedural ground for the first time on remand in order to evade this Court's rulings on a question of federal constitutional law. *See, e g , NAACP* v.

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[4] In any event, there is no basis for the Texas court's contention that petitioner failed to raise his objection to the jury instructions in a timely fashion In fact, as the court itself acknowledged, petitioner made a timely claim that the special issues failed to permit full consideration of his mitigating evidence, and in doing so he explicitly invoked *Penry I Ex parte Smith*, 185 S W.3d at 461 n 8 Petitioner's objection was clearly sufficient to apprise the trial court of his federal constitutional claim *See id* at 475-476 (Holcomb, J , dissenting "[T]he majority's reasoning that petitioner did not preserve error cannot be countenanced, and further, it is not supported by the record " *Id* at 475

Alabama ex rel Patterson, 360 U.S. 240, 244-245 (1959) (citing *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838)); *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872). Nor can courts inconsistently employ a state procedural rule as a means to thwart this Court's review. *See, e.g., NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456, 457-458 (1958).

Moreover, even assuming that the Texas Court of Criminal Appeals could, at this late date, invoke the state's "egregious harm" standard to deny petitioner relief, under no circumstances could it apply the standard in a way that contravenes the essential holding of this Court. Yet, that is precisely what the Texas court did here. It reasoned that petitioner suffered no egregious harm *because* the jury was able to consider most, if not all, of the evidence. *Ex parte Smith*, 185 S.W.3d at 471-472. The Texas court's harmless-error ruling was therefore premised on its judgment that the special questions and nullification instruction together provided an adequate vehicle for the jurors to give effect to the mitigation evidence—a judgment that directly conflicts with this Court's holding. *See Smith*, 543 U.S. at 38, 48.[5]

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[5] The concurring opinion's assertion that the egregious harm standard constitutes an independent and adequate state-law ground and therefore deprives this Court of jurisdiction is without merit *See Ex parte Smith*, 185 S W 3d at 472-473 (Hervey, J , concurring) A state-law ground is not independent where it is either "interwoven" with the federal ground "or is not of sufficient breadth to sustain the judgment without" the use of federal law *Michigan* v *Long*, 463 U S 1032, 1039 n 4 (1983) (quoting *Enterprise Irrigation Dist* v *Farmers Mutual Canal Co* , 243 U S 157, 164 (1917)) The Texas court's conclusion that petitioner failed to show egregious harm was necessarily "interwoven" with federal constitutional law because the error being assessed—by whatever standard—was federal constitutional error And, as explained above, the Texas court's conclusion that the federal constitutional error at issue failed to meet an egregious-harm standard was entirely dependent on an analysis of the effects of that error that revisited and distorted the analysis previously conducted by this Court As a result, it cannot be considered an independent state-law ground *See Oregon* v *Guzek*, 126 S Ct 1226, 1229-1230 (2006) (no independent ground where state court relied upon Supreme Court mitigation precedents to determine admissibility of evi-

II. THIS CASE MERITS THE SAME TREATMENT AS PAST CASES IN WHICH THIS COURT HAS REVERSED STATE COURTS THAT ATTEMPTED TO THWART ITS MANDATES

Over the course of the last two hundred years, this Court has often granted review of state and lower federal court decisions that have thwarted, evaded, or simply misapprehended its mandates, in order to reaffirm its authority "to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). The Court should do the same here.

1. When the Court was first established in 1790, it was by no means settled that its judgments would be respected as binding on state courts. Indeed, in the early years of the Republic, state courts repeatedly resisted this Court's authority to review their judgments on matters of federal law. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1,

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dence), *Harper* v *Virginia Dep't of Taxation*, 509 U S 86, 100 (1993) (no independent or adequate ground where state law holding "rested solely" on a failure properly to apply federal law), *Ake* v *Oklahoma*, 470 U S 68, 75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law ").

Moreover, even if the "egregious harm" standard were an "independent" ground, it would not be an "adequate" ground Procedural rules that are applied inconsistently, as in this case, will not divest this Court of jurisdiction *See James* v *Kentucky*, 466 U S. 341, 348-349 (1984) (only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights"), *Barr* v *City of Columbia*, 378 U S 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar review), *NAACP* v *Alabama ex rel Patterson*, 357 U S at 457-458 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights "). Here, as Justice Holcomb explained in dissent, the Texas court applied its preservation of error rule "capriciously and arbitrarily" to deny relief to petitioner despite his objection at trial that the jury instructions failed to comply with *Penry I*, and despite its previous decisions to address petitioner's claim on the merits *Smith*, 185 S W 3d at 477-478

161 (1913); Richard Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 479-480 (5th ed. 2003). Only as a result of this Court's resolve in the face of state-court resistance was its supremacy in matters of federal law established.

In the most notorious dispute of this Court's early years, Virginia's highest court refused to acknowledge the authority of the Court to review a decision construing the effect of a post-Revolutionary War treaty on the rights of two purported landowners. *See Hunter* v. *Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810), *vacated*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), *remanded to Hunter* v. *Martin*, 18 Va. (4 Munf.) 1 (1815), *rev'd*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). According to the Virginia court, section 25 of the Judiciary Act,[6] which conferred upon this Court the authority to exercise appellate jurisdiction over state courts, was unconstitutional. *Hunter*, 18 Va. at 58-59. Thus, the state court refused to follow this Court's express instructions to enter judgment for the devisee of the British subject whose land had been confiscated in violation of a federal treaty. *Id.* In response, this Court did not yield; instead, it issued another decision affirming its authority and renewed its order to the Virginia court to comply with its first mandate *Martin*, 14 U.S. 304. As the Court made clear, its final judgments are "conclusive upon the parties, and [cannot] be re-examined" either by the Court itself or by state courts. *Id* at 355.

In the years following *Martin*, as state courts continued to resist this Court's judgments, the Court repeatedly made clear that its decisions on matters of federal law were binding and must be followed. *See* Warren, *supra*, at 12-22, 25, 161-162, 129-186 (detailing state-court resistance to the Court's authority); *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (reaffirming the authority of the Court to review state-court judgments). For example, the Court repeatedly reversed state courts that issued writs of manda-

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[6] Judiciary Act of 1789, 1 Stat 73, 85 (1789)

mus and habeas corpus to federal officials, or that tried to prevent the execution of federal writs. *See* Charles Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 350-356 (1930); *see also M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821) (states have no right to issue a writ of mandamus to a federal official); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 195 (1867) (states lack "all power to restrain either the process or proceedings in the national courts"). As the Court declared in *Amy* v. *Desmoines County Supervisors*, if state courts had the power to prevent the execution of a federal writ of mandamus, "the Constitution of the United States, and the laws made in pursuance thereof . . . would be subordinated to the authority of the courts of every State in the Union." 78 U.S. (11 Wall.) 136, 138 (1870).

In a case involving the Fugitive Slave Act,[7] the Court acted no less than four times in order to stop the Supreme Court of Wisconsin from discharging a federal prisoner in violation of this Court's mandate. *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 513-525 (1859), *reversing In re Booth*, 3 Wis. 1 (1854), *Ex parte Booth*, 3 Wis. 145 (1854). The Court made clear in its final judgment in the case that

> no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

Id. at 525; *accord Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

2. As a result of these repeated exertions during the early years of the Republic, this Court's authority to review state-court judgments on matters of federal law was, by the

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[7] The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462

twentieth century, firmly established. Nonetheless, on numerous occasions during the last century, state courts, as well as lower federal courts, have ignored, evaded, or misapplied this Court's mandates and its guidance regarding the proper application of federal law. The cases cover a wide array of legal issues, from the federal constitutional rights of criminal defendants, *see, e g , Miller-El* v. *Dretke*, 125 S. Ct. 2317 (2005), to a corporation's right to assert in a federal forum its entitlement to arbitration, *General Atomic Co* v. *Felter*, 436 U.S. 493 (1978) (per curiam). And the lower and state court decisions at issue have ranged from the overtly disobedient, *see, e g , Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam), to the covert, devious, or simply wrongheaded, *see, e g , NAACP* v. *Alabama ex rel Patterson*, 360 U.S. at 244-245. Yet, whatever the legal issue or the manner of the lower courts' failure to abide by this Court's decisions, this Court has taken decisive action to protect the integrity of its mandates and to affirm its authority as the ultimate arbiter of federal law.

The maneuvers used by the Texas Court of Criminal Appeals to evade this Court's decision in *Smith* bear a striking resemblance to tactics of resistance that the Court has repeatedly discountenanced in the past. On numerous occasions, courts have applied new procedural grounds on remand—as the Texas court did here—in order to reinstate a ruling this Court had set aside. For example, in *NAACP* v. *Alabama ex rel. Patterson*, this Court reversed a decision of the Supreme Court of Alabama that upheld a judgment of civil contempt against the NAACP for failing to comply with a court order to reveal the names of its members. 357 U.S. 449, 467 (1958). On remand, the state court acknowledged this Court's holding, but then proceeded to re-institute its contempt order on a new ground, based on a different view of the record. *Ex parte NAACP*, 268 Ala. 531, 532-533 (1959). On certiorari, this Court again reversed, explaining that the state court could not employ a new rationale on remand to evade the Court's mandate. *NAACP* v. *Alabama ex rel Patterson*, 360 U.S. at 244-245 (quoting *Sibbald*, 37

U.S. (12 Pet.) at 492); *see also Tyler* v. *Magwire*, 84 U.S. (17 Wall.) at 284-285.

Similarly, in *Sullivan* v. *Little Hunting Park, Inc*, this Court vacated and remanded a decision of the Virginia Supreme Court of Appeals holding that petitioner's failure to comply with a state procedural requirement barred review of his racial discrimination claim. 392 U.S. 657 (1968). On remand, the Virginia court again asserted that the state procedural ground barred review of petitioner's claim. 209 Va. 279, 281 (1968). Faced with that attempt to evade the import of its prior ruling, this Court again granted review and reversed. 396 U.S. 229, 232, 234 (1969). More recently, in *Ford* v. *Georgia*, the Court vacated and remanded a decision of the Georgia Supreme Court rejecting the petitioner's claim of discriminatory jury selection. 479 U.S. 1075 (1987). On remand, the Georgia court for the first time held that petitioner's claim was procedurally barred. 257 Ga. 661, 663-664 (1987). Rather than permit the Georgia court thus to avoid the effect of its prior decision, this Court granted certiorari and reversed. 498 U.S. 411, 424-425 (1991).[8]

The Texas Court of Criminal Appeals engaged in similar sleight-of-hand here. When petitioner's case was first before the Texas court, the State argued that his claim was procedurally barred, but the majority declined to rule on that ground and instead addressed the merits; nowhere did the majority intimate that petitioner had failed to raise his claim in a timely fashion. *See Smith*, 543 U.S. at 43 n.3; *Ex parte Smith*, 132 S.W.3d at 410; *cf Ex parte Smith*, 132 S.W.3d at 423 (Hervey, J., concurring). Rather, it was only after receiving an unfavorable decision on the merits from this Court that the Texas court first invoked petitioner's pur-

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[8] The Court held in both *Sullivan* and *Ford* that the purported state-law ground of decision did not deprive this Court of jurisdiction because the state court had not consistently applied it and it therefore was not an adequate state ground *See Sullivan*, 396 U S at 234, *Ford*, 498 U S at 423-424 In this case, as demonstrated above, *see supra* n 5, the purported state-law ground for the Texas court's decision is neither independent nor adequate

ported untimeliness to deny relief. This Court has repeatedly refused to permit state courts to evade its rulings by manipulating state procedural law in this manner.

In other cases, the Court has reversed state or lower federal courts a second time when, on remand, they refused to accept that the Court meant what it said initially. *See, e.g., General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam) (involving entitlement to arbitration); *Stanton* v. *Stanton*, 429 U.S. 501 (1977) (per curiam) (involving sex discrimination in Utah family-law statute); *Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam) (involving sufficiency of evidence to support a jury award in a Federal Employers Liability Act case). The Court has made clear that it is not enough to pay lip service to its rulings while disregarding them in substance; the court to which this Court remands a case must respect the "thrust" of the Court's decision. *See Stanton*, 429 U.S. at 503. Accordingly, this Court has not only corrected instances of outright disobedience, where the state court does "precisely what [the Court] held that it lacked the power to do," *Felter*, 436 U.S. at 496, or undertakes "its own independent evaluation of the evidence . . . wholly apart from the judgment of the Supreme Court," *Deen*, 358 U.S. at 57; it has also refused to allow state and lower courts to evade its judgments on remand based on an unduly narrow reading of this Court's case law, or on implausible distinctions between the facts of their cases and the precedents upon which a remand order was based.

In *Henry* v. *City of Rock Hill*, for example, this Court vacated and remanded a decision of the South Carolina Supreme Court that upheld the criminal convictions of individuals peacefully "assembled . . . in front of the City Hall to protest segregation." 376 U.S. 776, 777 (1964) (per curiam) (describing prior decision in 375 U.S. 6 (1963)). On remand, the state court purported to comply with this Court's mandate. *City of Rock Hill* v. *Henry*, 135 S.E.2d 718, 718-719 (S.C. 1963). Yet, much like the Texas Court of Criminal Appeals in *Smith*, the court professed uncertainty about the true meaning of the Court's precedent and adopted an un-

duly narrow reading of the case law. *Id.* at 718-720; *cf Ex parte Smith*, 185 S.W.3d at 464, 466-467, 469-472 (misstating and dramatically narrowing this Court's holding in *Smith*). Then, after unpersuasively distinguishing the facts of its case from the precedent upon which remand was based, the court concluded that its original judgment should stand. *Henry*, 135 S.E.2d at 719-720; *cf Ex parte Smith*, 185 S.W.3d at 469-472.[9]

This Court again granted certiorari and reversed. *Henry*, 376 U.S. at 778. In a terse opinion, the Court made clear that such manipulation of its precedent would not be countenanced. As the Court explained, "under the Supremacy Clause," Supreme Court decisions are "binding upon state courts as well as upon federal courts," and although the Court's remand order "did not amount to a final determination on the merits," it did "indicate that we found [prior precedent] sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Id.* at 777. In short, a state court cannot pay lip service to the mandate, while evading its clear import.[10]

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[9] The state court acknowledged "the power and authority of the United States Supreme Court to reverse a State conviction for proper reasons or grounds based on the provisions of the Federal Constitution," *City of Rock Hill* v *Henry*, 135 S E 2d 718, 718 (S C 1963), and it claimed it was "endeavor[ing] to carry out the mandate of the United States Supreme Court," *id*; *see also id* at 719 Yet, the court found "that the light, if any, shed upon [the] instant case by the [Supreme Court's earlier] case is not readily or easily discernible," *id.* at 718 Just as the state court in *Smith* concluded that *Penry II* presented more egregious facts than the instant case, 185 S W 3d at 472, the *Henry* court explained· "We have reviewed the facts in this case, which we find more aggravated than those in the case [upon which remand was based], and conclude that there is nothing in th[at] case to require a reversal of [the] instant case," *Henry*, 135 S E 2d at 720.

[10] Two reversals were also necessary before the Florida Supreme Court complied with the mandate of the Supreme Court in *Chamberlin* v *Dade County Board of Public Instruction*, 374 U S 487 (1963) On the first grant of certiorari, the Court vacated the state court's decision, which had upheld various religious exercises in public schools, and remanded for reconsideration in light of two recent decisions *Id* at 487 On

Similarly, a state court's assertion that it has "acquiesc[ed]" in this Court's conclusion will be rejected when the state court applies the wrong harmless-error standard or misreads the record to which the standard is applied. *See Yates* v. *Aiken*, 500 U.S. 391, 399 (1991). Furthermore, an opinion that is only partially "responsive" to this Court's mandate will not stand. *See Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari because state court had not "fully complied" with the mandate). And, a state court cannot, as a means to evade this Court's mandate, use state law where the application of federal law is required: "The Supremacy Clause does not allow a federal retroactivity doctrine to be supplanted by invocation of a contrary approach to retroactivity under state law." *See Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (reversing where state court failed to apply federal retroactivity doctrine when applying the Court's decision regarding preferential tax benefits for state and local government employees).

The Court has applied the same principles when reviewing decisions by lower federal courts. Like state courts, lower federal courts may not fall short in their "attention to [this Court's] explanation of the governing legal standards." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999). Nor may they engage in "dismissive and strained interpretation" of evidence or case law to evade the clear guidance of this Court. *Miller-El*, 125 S. Ct. at 2339; *see also Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 847-849 (1986) (reversing Court of Appeals for second time where appellate court read precedent unduly narrowly). In short,

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remand, the Florida state court, like the Texas court in *Smith*, purported to "read with care" the Supreme Court decisions cited in the remand order 160 So 2d 97, 98 (Fla 1964) But it went on to critique the precedent as providing no "clear course for [the state courts] to follow," to distinguish its case from the Court's precedent, and to reach the same conclusion it had reached the first time it heard the case *Id* at 99 The Court again granted certiorari and reversed and remanded 377 U S 402, 402 (1964) (reversing in part and dismissing in part) Only when the Florida Supreme Court considered the case for the third time did it comply with the Supreme Court's mandate *See* 171 So 2d 535, 538 (Fla 1965)

this Court's cases over the last two hundred years have made clear that, whether state or federal, all lower courts must respect the integrity of this Court's mandates and the authority of this Court "to say what the law is." *Marbury*, 5 U.S. at 177.

Yet, that is precisely what the Texas Court of Criminal Appeals failed to do. Instead of following this Court's reasoned analysis, the Texas court concocted a new state-law procedural barrier it had previously declined to employ. It then ignored the specific findings of this Court and adopted an unduly narrow construction of the Court's holding, in order to reinstate the same result that this Court had previously rejected as inconsistent with the Eighth Amendment's dictates. The Texas court's decision thus undermines this Court's authority and contravenes its plain direction. This Court should reaffirm that it meant what it said in *Smith* and that state and lower courts must respect its decisions.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Texas Court of Criminal Appeals should be summarily reversed. In the alternative, the Court should grant plenary review and set this case for briefing and argument.

Respectfully submitted,

VIRGINIA E. SLOAN
PRESIDENT
THE CONSTITUTION PROJECT
1025 Vermont Ave., N.W.
Third Floor
Washington, D.C. 20005
(202) 580-6923

SETH P. WAXMAN
Counsel of Record
DANIELLE SPINELLI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

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